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**IN THE SUPREME COURT OF THE
UNITED STATES**

OCTOBER TERM, 1949

No. 97

97

THE UNITED STATES,
Petitioner,

VERSUS

JEFF W. MOORMAN and JAMES C. MOORMAN,
Co-Partners, doing business as J. W.
MOORMAN & SON,
Respondents.

On Writ of Certiorari to the Court of Claims

BRIEF OF RESPONDENTS

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NOVEMBER, 1949.

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BRIEF OF RESPONDENTS

QUESTION PRESENTED

As set forth on Page 2 of Petitioner's Brief, the question presented is, we submit, entirely incorrect. It begs the question.

The basic and fundamental question presented here is: Was respondent required under his contract with the United States, to grade the taxiway, which taxiway was not on the site as defined in the Contract, Plans and Specifications?

To answer that requires the determination of two additional questions:

1. Who shall determine respondent's liability under his contract?
 - a. As contended by respondent: The Court. For the reason Article 15 of the Contract is controlling, and limited the Engineer to the determination of questions of fact only.
 - b. As contended by petitioner: The Engineer. For the reason that Paragraph 2-16 of the Specifications controls over Article 15 of the contract, and permits the Engineer to determine both questions of law and fact.
2. Assuming, though not admitting that petitioner's view is correct, and the Engineer is to be permitted to construe the contract, in this case was not the decision as made by the Engineer so arbitrary and capricious, and so grossly erroneous as to amount to bad faith, and should it not be set aside, and the judgment of the Court of Claims affirmed?

STATEMENT

On April 4, 1942, petitioner and respondents entered into a contract by Letter of Intent (R. 5), by which the respondents were to move "approximately one million cubic yards of grading (excavation) at the site of the Oklahoma City Aircraft Assembly Plant, Oklahoma City, Oklahoma, in strict accordance with the specifications, schedules, and drawings, all of which are made a part hereof or which will be furnished to you prior to April 8, 1942."

Formal Contract (R. 7) was entered into, dated April 3, 1942, the front page of which stated:

"Contract for grading plant site. Place: Oklahoma City Aircraft Assembly Plant," and the body of the

Contract provided that the contractor shall furnish the materials and "perform the work for *grading the site* of the Oklahoma City Aircraft Assembly Plant, and to be in strict accordance with specifications for grading of plant site, Oklahoma City Aircraft Assembly Plant, and the drawings referred to in paragraph 1-15 of the specifications."

The specifications which accompanied the signed contract contained this clause:

"1-02 Location: *The plant site* to be graded in accordance with the plans in these specifications is located in the Southeast Quarter (SE $\frac{1}{4}$) of Section Fourteen (14), and the East Half (E $\frac{1}{2}$) of Section Twenty-Three (23), Township Eleven North (11 N), Range Two West (2 W) of the 1M, approximately seven miles southeast of the business district of Oklahoma City, Oklahoma" (R. 11).

The drawings referred to in paragraph 1-15 of the specifications were two blueprints, one known as Location Map G 2, and the other as Plat Plan G 3. The Plat Plan showed Range 29 to be the west boundary limit of the Oklahoma City Aircraft Assembly Plant and was designated in the blueprint with the words "property line." Similarly, north of Station 80 is a line likewise designated as "north property line" on the blueprint.

On June 17th and 18th, 1942 (R. 14 and 29), the petitioner through their engineering department directed the respondents to grade area No. 6. This area 6 was west of Range 29 (700 feet) and extended north (1400 feet) beyond Station 80, and all of this grading as so ordered was outside of the site of the Oklahoma City Aircraft Assembly Plant and was on the site of another Govern-

ment project, to-wit: Oklahoma City or Midwest Air Depot or Tinker Field (R. 30).

Respondents protested this order for grading outside of the site but did the work as required.

At the same time the petitioner required an Industrial Road to be constructed north of Station 80, which was likewise outside of the area or site of the Oklahoma City Aircraft Assembly Plant. This likewise was performed.

Claims were presented for work done on these two items, on the theory that there was no contract. Both claims were disallowed by the engineer and appeal taken to the Secretary of War (R. 31 and 32). The Secretary of War allowed payment for the Industrial Road (R. 37), but disallowed payment for the grading of the Taxiway (R. 33 & 34). Suit was filed, and the Court of Claims allowed respondents judgment as set forth in the Petition (R. 24-42).

The controversy arose, as developed in the hearings in the Court of Claims, but which was never divulged in the taxiway case before the Secretary of War, for the reason that the Government did not disclose the map which is hereinafter discussed. The interpretation and rulings of the engineer arose because of the following facts: At the time contractors were invited to bid, the Government handed to prospective bidders a blueprint with seven (7) red pencil corrections and notations thereon (R. 31). (This red marked blueprint. Petitioner's Exhibit No. 1, is shown as an Appendix at the back of this brief). The petitioner concedes that the respondents did not receive

the same copy of blueprint that was given to the other prospective bidders (R. 37 & 38). In other words, the respondents never received a red marked blueprint, and never saw it until the written order to grade area 6 was issued (R. 33).

This red marked blueprint had certain corrections or notations on it in red pencil marks which changed in a very important manner three things:

(1) There was a notation which disclosed the property line as being approximately Range 36 and not Range 29, and this westward (approximately 700 feet) extension was marked "west limits of grading plant site" (R. 31). This new area was off the site of the Oklahoma City Aircraft Assembly Plant; and was on the site of another government project — Midwest Air Depot.

(2) In addition there was added a notation "taxiway grading included in grading plant site" (R. 19).

(3) Extending north (approximately 1400 feet) and both north and west of the plant site were these additional words: "Include in grading plant site."

Furthermore, this red penciled blueprint was not carried forward into the completed Contract (R. 32). On the contrary, the blueprints that accompanied the Contract had no notations on them, and there is nothing to indicate any grading or excavation west of Range 29 and north of Station 80; but on the contrary, on the designated "taxiway" which is west of Range 29 (and off the site) is shown the word in parenthesis "proposed" (R. 19 & 27).

It is conceded that at the time the petitioner ordered the work (taxiway) done west of Range 29, which was outside of the site of the Oklahoma City Aircraft Assembly Plant; as well as at the time the claim was disallowed by the engineer, they had before them the red marked blueprint (basing their ruling on it) and erroneously assumed that the respondents likewise had been furnished a copy (R. 32 & 36). Also the opinion of the Secretary of War disallowing the taxiway claim made no mention whatsoever of the blueprint Plat Plan G 3, marked in red (R. 33). But the Secretary of War in allowing payment for the Industrial Road referred to the red marked blueprint, and based his opinion on it (R. 34).

All of the above facts are borne out by the findings made by the Court of Claims.

SUMMARY OF ARGUMENT

This case clearly presents a situation in which an initial error or mistake leaves in its wake resulting apologies and attempts to justify such initial error or mistake. The Engineers, after they had drafted the blueprints, changed their minds and decided to increase the work to be done, which additional work was the construction of the Taxiway here involved, and which Taxiway was off the site of the Douglas Aircraft Assembly Plant. However, errors then came into being:

First, they failed to give a copy of this red-penciled blueprint to the respondent and,

Second, either by inadvertance, or change of mind, the blueprints that became incorporated in the contract did

not show the red-penciled changes, but on the contrary, showed the work to be done within the boundaries of the site as set forth in the specifications, contract and plans, and furthermore, indicated on the Taxiway the word "proposed."

Third, the Engineers then ordered the additional work done and disallowed the claim therefor, on the erroneous assumption that respondent had been furnished such red-marked blueprint.

From that point on, much effort has been expended in an attempt to justify this error, or change of mind. The Engineer, in calling for the work and denying the claim, admittedly based his work order and denial on the assumption that the respondent had received a copy of the red-marked blueprint. The position of the petitioner in the denial of the claim and its resistance in the Board of Contract Appeals; in the Court of Claims; and in the two briefs filed herein, are put in the position of trying to avoid the consequences of the error, or change of mind, of what the petitioner, in his brief, denominates as "experienced, specialized personnel."

In the Summary of Argument, commencing on Page 9 of the brief filed herein, the position is again taken that the clause in the specifications controls over that of the contract. By so doing petitioner is guilty of trying to avoid the consequences of the Contract, prepared in its entirety by the petitioner, who is responsible for any irregularities, conflicts, or ambiguities therein.

We submit that, using the same argument advanced by the petitioner, on Page 11 of their brief, that they are in no position to assert that they are not bound by Article 15 of the Contract.

ARGUMENT

1. Article 15 of the Contract controls and only questions of fact could be determined by the Engineer.

The Contract as originally presented at the time respondent bid, contained Article 15 (R. 9) and likewise contained paragraph 2-16 of the specifications (R. 10). That latter paragraph provided for appeals to the Chief of Engineers, United States Army and also contained this statement: "(See Article 15 of the Contract.)" As actually furnished, the Contract again contained Section 15 and contained paragraph 2-16 of the specifications, which provided for appeal to the Secretary of War, instead of to the Chief of Engineers, and left out the parenthetical reference to Article 15 of the Contract (R. 40).

a. It must be borne in mind at all times that Article 15 (R. 9) is in the Contract and not in the specifications. Apparently a similar clause is carried forward in all the government contracts.

Petitioner, on Page 10 and Page 20 of the Brief, indulges in the statement that Article 15 explicitly permits exceptions and "indicates room for additional provisions regarding disputes to be incorporated in the agreement." We submit that this analysis is wholly incorrect and is not

borne out by a reading of this article, and the application to it of ordinary use of English words. The clause at the beginning of the article modifies and controls the balance of the article and any exceptions or additional provisions necessarily relate to "disputes concerning questions of fact."

b. Paragraph 2-16 of the specifications, which petitioner argues is controlling, is in the specifications, and not in the Contract itself.

Let us analyze for the moment the meaning of specifications.

(1) Webster's *Twentieth Century Dictionary*, Unabridged, defines "specifications" as follows:

"A particular and detailed account or description of a thing; specifically, a statement of particulars, describing the dimensions, details, or peculiarities of any work about to be undertaken, as in architecture, building, or engineering."

(2) The courts have held as follows:

"The term 'specifications' as used in a building contract ordinarily means a detailed and particular account of the structure to be built, including the manner of its construction and the materials to be used."

Woolacott v. Meekin,

151 Cal. 701, 91 Pac. 612, 615.

" 'Specifications' not only embraces the dimensions and mode of construction, but includes a description of every piece of material, its kind, length, breadth and thickness, and manner of joining the separate parts together."

Superior Incinerator v. Tompkins (Tex.),
37 S.W. (2d) 391, 395.

(3) Let us examine our own exhibits, and we find as follows:

Specifications:

"1-01 General.—These special provisions are a part of the specifications for this contract and shall be consulted in detail for instructions pertaining to this work (R. 11). See also 3-01" (R. 13).

Special Provisions—1-14:

"Work covered by Contract Price—The Contractor shall, for the contract price, furnish and pay for all materials, labor and all permanent, temporary, preparatory, and incidental work, furnish all accessories, and do everything which may be necessary to carry out the contract in good faith, which contemplates the completion of everything in good working order completed in accordance with the plans and these specifications" (R. 12).

General Provisions—2-02 (15):

"Specifications—The written description of the materials, instructions for the installation of the materials and other information pertaining to the execution of the contract which are a part of the contract documents. The specifications may be altered by supplementary specifications or addenda which will become a part of the contract when issued" (R. 13).

2-03 (a):

"General—It is the intent of the plans and specifications to describe a completed work to be performed under this contract. Considerable latitude is allowed in these specifications in order that there may be no unfair discrimination against the builders of different styles and types of equipment. For this reason, no omission of any detail from the specifications shall release the Contractor from furnishing any materials or equipment, usual or proper, nor from doing anything necessary for proper and complete construction, unless specifically set forth in the Contractor's proposal" (R. 13).

The Contract itself makes a sharp distinction between the Contract and Specifications —

Article 1 (R. 7). The Contractor shall * * * perform the work for grading the site * * * in accordance with the specifications.

Article 3 (R. 8). The Contracting Officer may at any time, by a written order * * * make changes in the drawings and/or specifications of this contract within the general scope thereof.

These, we submit, show conclusively that there is a clear, sharp and distinct difference between "Contract" and "Specification."

It is very clear that it was never intended that the specifications were to be or mean anything other than as commonly and normally understood. That is, specifications were not intended to be a substitute for the Contract, but they were to perform their natural and normal function, to-wit: advise the contractor as regards the type, manner, and mode of work. It is not necessary to read paragraph 2-16 out of the Contract. In their true position and function, they remain in — complementary and explanatory — as found by the Court of Claims (R. 39):

"Paragraph 2-16 is entitled 'Claims, Protests and Appeals' and is primarily a procedural provision intended to provide an orderly method for carrying out the provisions and purposes of Article 15 of the standard formal contract. Such a paragraph in 'General Provisions' of the specifications has itself come to be standard provision, and, as we pointed out in the *Piotzer case, supra*, the fact that the specifications, which are intended to delineate the work to be done and the procedures to be followed, are made a part

of the contract by Article 1, does not warrant the conclusion that they override an express provision of the contract. Provisions such as paragraph 2-16 must, if possible, be read and interpreted in the light of and consistent with the provisions of the formal contract. When this is done, there is no conflict between Article 15 and paragraph 2-16."

c. Article 15 remained in the Contract, although certain changes were made in the Contract as disclosed by Article 22 (R. 9) of the Contract which delineated the alterations. In this Article 22 all the changes that were made in the Contract and in the Specifications were expressly noted — and Article 15 remained intact. Certainly, had the Petitioner (who is solely responsible for the Contract) intended that Article 15 be eliminated, or made subservient to Paragraph 216 of the Specifications, it would have been easy and simple to make this known by its deletion or modification, and the fact that it was not done leads but to the one conclusion — that it was intended to function as written.

The above proposition is further supported by Article 3 of the Contract (R. 8):

"If the parties fail to agree upon the adjustment to be made, *the dispute shall be determined as provided in Article 15 hereof*. But nothing provided in this Article shall excuse the Contractor from proceeding with the prosecution of the work as changed."

d. Petitioner's position assumes a conflict between the Contract and the Specifications and it would ignore Article 15 of the Contract. This conflict, contradiction, or ambiguity arises in a contract wholly prepared or drafted

by the petitioner; and by the decisions of this Court should be interpreted most favorably against the party who drew the Contract and created the doubts, inconsistencies and ambiguities.

Hollerbach v. United States,
233 U.S. 172, 58 L. ed. 901,
134 S. Ct. 553;

United States v. Spearin,
248 U.S. 132, 63 L. ed. 166, 39 S. Ct. 59;

Reading Steel Casting v. United States,
268 U.S. 186, 45 S.Ct. 469, 69 L. ed. 907.

To summarize, there are three possible results arising from the apparent conflict in these two clauses:

(1) Hold that Art. 15 is controlling, not changed by Par. 2-16 of the Specifications. This, due to the fact that (a) Art. 15 is in the Contract and Par. 2-16 is in the Specifications. (b) Art. 15 was purposely left in the Contract when ample opportunity was given to amend or delete it, as there were amendments and deletions. (c) In case of conflict, construe the Contract most strongly against the party responsible for the conflict.

(2) Hold that the two clauses remain intact, and adopt the view of the Court of Claims, that Par. 2-16 implements Art. 15, and shows merely the procedural steps.

(3) Hold that Art. 15 is to be eliminated and adopt Par. 2-16 of the Specifications as controlling. This is the position of the Petitioner. We submit it is incorrect, illogical and unsound.

(a) It fails to give any satisfactory logic or reason why Art. 15 is to be deleted and ignored.

(b) It fails to show in any manner why a clause in the specifications shall be given a function not normally given such. If it had been intended that a provision in a specification should override an Article in the formal contract, such intention would have been expressed, or the specification would have been mentioned in Art. 15.

(c) It fails to show reason or authority why an Engineer should be permitted to create doubts, inconsistencies and errors in a contract and then be the sole judge as to their intent and meaning — and in so doing, expressly interpret the contract, both as to law and fact, and make rulings of law. As stated in *U. S. v. Lundstrom* (C.C.A. 9, 1943), 139 Fed. (2d) 792, this was hardly the intent of the Government:

“The contract contains the following provision (similar to Clause No. 15), ‘It is the position of the Government that this provision covers the dispute over the description of the materials to be hauled, that it was the duty of Lundstrom to follow the procedure therein, and that the district court was without jurisdiction of the subject matter.’ But if this were true, the very untenable and paradoxical situation would be present that the Government, one of the parties to the contract, would have the decision as to the meaning and extent of its contract. Provisions such as here under consideration do not relate at all to the interpretation of the Contract. Issues so arising are strictly issues of law for the courts to determine.”

(d) It permits the Engineer to make arbitrary and capricious rulings, both of law and fact, so grossly erroneous as to be almost ridiculous, and penalize the innocent other party to the contract.

2. The determinations of the Engineer were so grossly erroneous as to necessarily imply bad faith, and are subject to the revisory power of this Court.

a. The Engineer in charge drafted the original blueprints, which conformed in its boundaries to the site as set forth in the specifications.

b. The Engineer changed his mind and increased the work to be done and changed the boundaries and evidenced this by making seven red markings and changes on the blue prints.

c. It was the intention of the Engineer to furnish a red-marked blueprint to all prospective bidders, but, through mistake, respondents were never given such a copy, and never knew of the intention of the petitioner to increase the work to be done.

d. The respondents never saw this red-marked blueprint until long after they had signed the Contract and actually when the work was ordered to be done on the Taxiway, which Taxiway was outside the site of the Oklahoma City Aircraft Assembly Plant.

e. The Contract, as signed, did not carry with it the red-marked blueprint. Respondents do not know whether this was through inadvertance, error, or complete change of mind; the blueprints, as furnished with the Contract, had the word "proposed" written after taxiway.

f. The Engineer ordered the work to be done on the Taxiway on the assumption that respondent had received a red-marked blueprint, and the Engineer admitted in his testimony that he knew there had been a mistake.

g. The Engineer ordered the Industrial Road built, which was off the site of the Aircraft Assembly Plant, on the same assumption.

h. The Engineer denied respondents' claim for additional pay for the construction of both the Industrial Road and the Taxiway, and gave the same reasons for both, to-wit: That the respondents had been furnished a red-marked blueprint.

i. The Board of Contract Appeals denied relief on the Taxiway, without referring, at any time, to the red-marked blueprint.

j. The Board of Contract Appeals subsequently allowed the claim on the Industrial Road, and expressly referred to the red-marked blueprints. There is no way these divergent rulings can be reconciled.

On Page 23 of the brief, petitioner refers to the Engineers as "experienced, specialized personnel." These rulings do not bear out such a conclusion.

In fact, the Board of Contract Appeals, in its opinion on the Industrial Road, used the following language:

"All of these circumstances above related, considered in the light of the uncertainty of the specifications and drawings, indicate to the Board that neither party intended at the time the contract was entered into that the appellant would be required to grade the 'industrial road' site, and, therefore, the requirement by the contracting officer, that the appellant grade this 'industrial road' site was extra work not originally contemplated by either party, and the appellant is entitled to be paid a reasonable sum for this work" (R. 35).

The Court of Claims made no mention as to gross errors of judgment or bad faith, as they decided it without the necessity of such findings.

We respectfully submit that this Court, with this record before it is necessarily driven to the conclusion that the Engineers were guilty of bad faith, or such gross errors of judgment as would imply bad faith; because it is inconceivable that the errors and mistakes of the Engineers in this chronological sequence of events, as above delineated, and which resulted in expense to the respondent, should be borne by the respondent. The respondent did the work and the petitioner got the benefit of it. The respondent did the work at increased costs, and should not be punished or penalized for the errors and mistakes of the Engineer, which gross mistakes should be subjected to the revisory power of this Court.

Petitioner urges the proposition that the Engineer shall be permitted conclusively to determine the meaning and boundaries of the contract. In the face of an admitted original intent to increase the area of the work, and to increase the work to be done—and to provide for this work off the site as defined in the contract, plans and specifications—and with a definite change of mind, or error, and an abandonment of this increase in area, still, petitioner would permit the Engineer to construe the Contract as to its area, extent and boundaries, and determine the extent of the liability of the contractor. If ever there was a perfect instance where the "expertness of the judge in this field" was to be applied, it is here (See Williston, Contracts, Vol. 3, Sec. 616 — Petitioner's brief, Page 21).

If Engineers' "experienced, specialized personnel" commit such gross errors and show such incompetence in their

own field (See opinion, Board of Contract Appeals, R. 37, and compare opinions in Taxiway and Industrial Road), we are sure they are not qualified in the field of acting as courts—in passing on their own ambiguous contracts, or on their own errors of omission or commission. The law of contracts as announced by the many decisions of this Court, can not and will not be remade, and the functions of the courts handed over to Engineers, as argued by petitioner.

The question here is whether the Engineer shall be permitted to determine the liability of respondents to construct the Taxiway—and that requires a legal construction of the contract.

Statement is made to the effect that *U. S. v. McShain*, 308 U.S. 512, 520 is virtually on all fours with the instant case. We submit that on examination and analysis, this claim is clearly neither accurate nor correct. Here we deal with a clause in the *Contract* (Article 15), which refers to questions of fact only—and of more importance, the contention of respondents that there was no contract at all as regards work to be done off the site, which clearly isn't an engineer's construction or interpretation of work to be done thereunder. In the *McShain* case, no such issue was involved. There, it was a conflict between the plans and specifications requiring an interpretation. No question as regards the contract. The Court of Claims (88 Court. Cl. 284, 296, 297) said:

"During the course of existing differences over the backfill item, the construction engineer in order to

forestall an apparent delay in finishing the work requested the plaintiff in writing to proceed with the same and at the same time said 'your observance of this request to proceed with the work' will be the subject of an adjustment of the costs later on. Using a backfill of gravel increased the plaintiff's cost of doing the work by the sum of \$1,877.93.

"Specification 66 refers to Drawing E-404 and this drawing points out where the subsurface drains are to be installed, and does not provide for a backfill of gravel as to the tile drain to be installed underneath the center of the concrete slab.

"It is admitted that a difference existed between the specifications and the work called for under the plans and this difference was as to the character of backfill over the drains. Drawing E.404 expressly discloses an entire absence of any requirement to backfill the drainage area under the center of the concrete slab with gravel and the determination of this question involved not a determination of facts but an interpretation of the contract, drawing, and specifications.

"The contracting officer, in order to reach a conclusion, did of necessity predicate the same by construing the specifications and drawing to exact a backfill of gravel for the drain under the concrete slab by implication. It could not have been done otherwise, for it is clear that no express language imposed this duty upon the contractor. * * *

"The plaintiff performed this extra work under protest. As a matter of fact, a proposal for performing it and the added cost involved were furnished to and considered by the defendant, and, notwithstanding the fact that subsequent to its rejection the plaintiff proceeded under the contract to obtain an extra allowance, we now think that under the decision of this court in the *Davis case, supra*, the plaintiff is entitled to a judgment for \$1,877.93 for performing this extra work. The amount the plaintiff seeks is not challenged by the defendant and it will be included in the final award."

With no opinion, this Court reversed as to this \$1877.-93 item.

CONCLUSION

The Court of Claims based the decision in the instant case on *U. S. v. Pfozter*, 77 Fed. Supp. 390, 111 Ct. Cl. 184. That case is almost identical to our case. This Court in December, 1948, denied *certiorari* in the *Pfozter* case, 335 U.S. 885.

No new question of great importance is raised here and no question that wasn't raised in the *Pfozter* case. We respectfully submit that *certiorari* was improvidently issued in this case, and that this Court should set aside its order of October 10, 1949, allowing *certiorari*, and enter an order denying *certiorari*.

Or, in the alternative, and for the reasons above set forth, we respectfully submit that the judgment of the Court of Claims is correct and should be affirmed.

Respectfully submitted,

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NOVEMBER, 1949.

